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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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Respondents' primary reliance in opposing the petition for certiorari is the claim that one of the defendants in the District Court was a resident of Utah and that the decision of the Court of Appeals can be sustained on that basis. (Brief in Opposition, pp. 2, 13, 14, 16) This position is in sharp contrast with the position which respondents took in the Court of Appeals where respondents stated the venue issue as follows:

> "Venue in the present case depends upon whether the BRT is held to 'reside' within the judicial district of Colorado where it represents employees or in Cleveland, Ohio, which is the location of its headquarters and its principal place of business, as required by its constitution." (Brief of Appellants in the United States Court of Appeals for the Tenth Circuit, p. 6.)

The two briefs which respondents filed in the Court of Appeals are utterly devoid of any reference to or reliance upon the claim that a Utah resident had been a defendant in the District Court. As stated, the sole venue objection which the respondents raised in the Court of Appeals related to the residence of the Brotherhood of Railroad Trainmen, and the decision of the Court is limited to a resolution of the question thus posed.

What respondents do not make clear in their brief in opposition is the fact that the defendant Brown, purportedly a resident of Utah, was dismissed from the action prior to the entry of judgment (R. 80). The judgment from which respondents appealed runs only against R. E. Carroll and the Brotherhood of Railroad Trainmen. The alleged Utah resident is not a party to the judgment and was not a party to the appeal. Consequently, respondents are in the position of relying here upon a venue objection which was not raised in the Court of Appeals and which could have been raised only by a defendant who was dismissed from the action before entry of judgment in the District Court. Since venue is a personal matter, it is clear that the respondents may not attempt to sustain the decision of the Court of Appeals by urging venue objections applicable to others who are no longer parties to the litigation.

Since the time of this Court's decision in *Camp* v. *Gress*, 250 U.S. 308, it has been considered established doctrine that the defense of improper venue is personal, that it may be raised only by the affected individual and not by others, that it may be waived, and that improper venue as to some defendants does not deprive a court of jurisdiction to render judgment as to others. *1 Moore's Federal Practice* 1321; *Hart and Wechsler, The Federal Courts and the Federal System*, p. 950; *Vance Trucking Co.* v. *Canal Insurance Company*, 338 F.2d 943 (4th Cir. 1964); *Schoen* v.

Mountain Producers Corp., 170 F.2d 707 (3rd Cir. 1948), cert. denied, 336 U.S. 937; *Riley* v. *Union Pacific R. Co.*, 177 F.2d 673 (7th Cir., 1949), cert. denied, 338 U.S. 911.

Respondents' reliance on the claimed Utah residence of defendant Brown is in conflict with each major aspect of the venue principles established by *Camp* v. *Gress, supra.* Respondents seek to assert a venue objection which is not applicable to them, which was not raised by respondents in the Court of Appeals and which was eliminated in any event by the dismissal of defendant Brown in the District Court. Since no appeal was taken from defendant Brown's dismissal, it is apparent that any venue objections which he might have had cannot assist the respondents here.[1]

Respondents also urge that the provisions of Section 1391(c) of Title 28 do not apply to an unincorporated association since Congress in Section 301 of the Labor-Management Relations Act specifically provided that a labor organization might be sued in any district in which it is engaged in representing or acting for employee members. Respondents state that "If it could have been sued in any such judicial district under the general venue statute, such a specific provision would not have been necessary." (Brief in Opposition, Page 12.) What respondents over-

[1] The record of proceedings in the District Court does not indicate any specific venue objection by defendants, including the respondents here, based on the asserted Utah residence of defendant Brown. The first motion by defendants raising venue objections was based on the claim that the Brotherhood of Railroad Trainmen was not a resident of Colorado (R. 4). The second motion sought dismissal "on the ground of improper venue" (R. 9). The final instrument in which the defendants asserted improper venue in the District Court, the Answer to the Amended Complaint, was limited to the situation of the Brotherhood of Railroad Trainmen (R. 11). It may reasonably be concluded, therefore, that any venue objection based on the residence of defendant Brown was waived.

look in making this argument is the fact that the general venue statute as it existed in 1947 when the Labor-Management Relations Act was passed did not contain what is now Section 1391(c). At the time of the enactment of the Labor-Management Relations Act the general venue statute was comparable to the statute discussed by Judge Learned Hand in *Sperry Products* v. *Association of American Railroads,* 132 F.2d 408 (2nd Cir., 1942), limiting venue to the defendant's principal place of business or to the judicial district of which defendant was an inhabitant. Consequently, it was necessary at that time to provide specifically for actions against unincorporated associations in districts in which they were doing business, if the associations did not maintain their principal places of business therein. The more general venue provision discussed by the court in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 (2nd Cir., 1962), was not enacted until September 1948. Thus, the fact that Congress in 1947 specifically authorized actions in districts where labor unions were representing employees does not support respondents' interpretation of the general venue provisions enacted in 1948.

Respondents' reliance upon the provisions of 29 U.S.C.A. § 412 is also misplaced. When Congress provided in Title 1 of the Labor-Management Reporting and Disclosure Act of 1959 that actions could be brought against labor unions in the judicial districts in which the alleged violations occurred, it was expanding venue beyond that comprehended by the general provisions of Section 1391. Consequently, the fact that Congress specifically provided for venue in such judicial districts in 1959 in actions arising under the Labor-Management Reporting and Disclosure Act does not support the argument that the general venue provisions of Section 1391(c) are inapplicable to unincorporated associations.

Much of respondents' brief in opposition is devoted to a reiteration of the arguments on the merits which the District Court overruled when it entered judgment against respondents for damages resulting from the unlawful strike. Since the Court of Appeals considered only the venue issue, respondents' discussion of the merits is wholly irrelevant to the issues raised by the petition. Accordingly, we shall not undertake to reply to the tenuous arguments which respondents advance, but we do desire to call the Court's attention to a wholly unwarranted assertion which appears at page 4 of the brief in opposition. Respondents state that the "contract violation by the Rio Grande originally took place in 1952 and continued over a period of approximately eight years." As the award of the National Railroad Adjustment Board shows, however, the question as to whether or not the Rio Grande could properly require crews of incoming freight trains to herd engines at its North Denver Yard was submitted to a Special Board of Adjustment by the Rio Grande and the Brotherhood of Railroad Trainmen in 1952. On June 23, 1952, the Special Board of Adjustment rendered an award sustaining the position of the Rio Grande (Award 19389, Volume 142 of the Reports of the First Division of the National Railroad Adjustment Board, Page 858). Although the agreement between the Brotherhood of Railroad Trainmen and the Rio Grande provided that the award of the Special Board was to be final and binding, the Brotherhood of Railroad Trainmen nevertheless refused to accept the decision of the Special Board and filed claims with the National Railroad Adjustment Board based on the precise carrier practice which had been approved by the Special Board. On January 20, 1960, the National Railroad Adjustment Board held that the carrier practice was a violation of the agreement, despite the prior final and binding award of the Special Board. The carrier then discontinued the practice of having the crews of in-

coming trains herd engines at the North Denver Yard. Consequently, the herding practice which the carrier followed at its North Denver Yard during the period from 1952 to 1960 was in conformity with the decision of the Special Board of Adjustment. Since the Special Board of Adjustment had found that this practice was proper under the agreement, it is obvious that the carrier was not pursuing a practice which could properly be called a violation of the agreement. By referring the matter to the Special Board in 1952, the carrier had sought to dispel any doubts about the validity of the practice under the existing agreement and had secured what it considered to be a final and binding determination. It was only because of the Brotherhood's stubborn refusal to honor this determination that the subsequent difficulties arose.

Respectfully submitted,

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